intent not to hold satellite carriers liable for mere good faith mistakes. At a minimum, therefore, PrimeTime has committed a "willful or repeated" violation of Section 119 if it was grossly negligent in meeting its statutory obligations.

This court has no difficulty concluding that no reasonable fact finder could fail to find that PrimeTime was grossly negligent in complying with its duties under SHVA. Indeed, substantial evidence exists that PrimeTime's violation of SHVA's white area restriction was willful. The undisputed evidence shows that PrimeTime was aware of the Grade B signal standard:

• PrimeTime lobbied Congress in the drafting of SHVA to reject the objective Grade B signal standard in favor of a subjective picture quality standard. Congress rejected this option. PrimeTime then urged the United States Copyright Office to recommend to Congress that SHVA be amended to delete the Grade B signal standard in favor of a subjective subscriber assessment of picture quality.

• In mailings to subscribers regarding SHVA, PrimeTime stated that the Act imposes "a technical standard used by the [FCC] as an indicator of adequate service. Unfortunately, this technical standard often does not reflect the quality of the picture that you are actually getting on your television set."

• In letters to persuade subscribers to lobby Congress to rewrite SHVA, PrimeTime stated that "[u]nder the current law, your ability to view satellite network t.v. is based upon the intensity of the signal you receive from your local station, not based upon the quality of the picture of your t.v. set."

• Former PrimeTime CEO Sid Amira testified that the only way "to be totally determinative" that a subscriber's household is unserved and thus eligible to receive network programming via satellite is to conduct a signal strength test at the subscriber's household. (Amira Dep. at 100).

• PrimeTime has nevertheless provided network programming to approximately 35,000 households in WTVD's local market without first conducting any signal strength tests. In fact, PrimeTime has conducted only seventeen tests of the signals received at a subscriber's household, and only fourteen of these households were within WTVD's local market. Although these tests revealed that WTVD's over-the-air signal was of at least Grade B field strength at nine of fourteen subscriber households within the local market, PrimeTime continued to retransmit ABC network programming to its subscribers within WTVD's local market.

• PrimeTime continued to enlist subscribers within WTVD's local market without conducting signal strength tests, even after ABC filed this lawsuit. More than 200 of these new subscribers

reside in towns less than seven miles from WTVD's broadcasting tower.

In opposition to this mountain of evidence, PrimeTime can muster only a protestation of good faith. Although PrimeTime knew of the governing legal standard, it nevertheless chose to adopt one it found more convenient. PrimeTime was broadcasting network programming to thousand of subscribers who received a signal of Grade B intensity as defined by Congress. PrimeTime has simply ignored the Grade B test even though it tried and failed to persuade Congress to adopt a test of eligibility based upon subscriber declarations about over-the-air reception. "A good faith belief as to what the law should be, or what you want the law to be, is not enough." Columbia Pictures, 919 F. Supp. at 690. The court therefore finds that there is no material dispute that PrimeTime's transmissions to ineligible households were grossly negligent and "repeated."

C. Prima Facie Case of Copyright Infringement Under Section 119(a)(5)(B)(ii)

SHVA states that if PrimeTime has engaged in "a willful or repeated pattern or practice" of delivering network programming to subscribers who do not reside in unserved households, then the court "shall" order a permanent injunction barring the secondary

transmission by PrimeTime of ABC network programming. 17 U.S.C. § 119(a)(5)(B)(ii). Although the statute does not define "pattern or practice," the legislative history states that no pattern or practice exists unless over twenty per cent (20%) of a defendant satellite carrier's subscribers in a local market are ineligible to receive network programming. See H.R. Rep. No. 100-887(I), at 19 ("[I]t is the intent of this statute that no pattern or practice be found if . . . less than 20% of the subscribers to a particular network station . . . are found ineligible."). As discussed supra, no reasonable fact finder could fail to find that PrimeTime's violations of SHVA are "willful or repeated." The court must also conclude that no reasonable fact finder could fail to find that PrimeTime's actions constitute a pattern and practice of statutory violation. Although PrimeTime has over 11,000 subscribers in the Raleigh-Durham market, it can show that of these only five meet SHVA's criteria for eligibility. Even if PrimeTime does terminate the additional 2,700 ineligible subscribers scheduled for deauthorization, the failure of proof for all but five out of the remaining 9,000 subscribers within WTVD's local market compels the conclusion that far more than twenty per cent of

PrimeTime's subscribers in this market are ineligible.[4] Furthermore, PrimeTime's substitution of a subjective picture quality test for SHVA's objective signal strength test in its "compliance" program led to systematic violation of SHVA's white area restriction. As a matter of law, therefore, PrimeTime's service to ineligible subscribers in WTVD's market constitutes a pattern and practice of willful or repeated copyright infringement within the meaning of Section 119(a)(5)(B)(ii).

ABC has shown a prima facie case of copyright infringement entitling it to relief under Sections 119(a)(5)(A) and (a)(5)(B)(ii). PrimeTime has raised, however, three affirmative defenses: estoppel, unclean hands, and waiver. Whether or not PrimeTime is successful in asserting these defenses, they are relevant only to the question of the scope of equitable relief necessary for PrimeTime's violations of SHVA's white area restriction. See 17 U.S.C. §§ 119(a)(5)(A) & (a)(5)(B)(ii). The court will therefore address these issues, to the extent necessary, at a subsequent hearing on ABC's request for injunction under these sections of SHVA.

---

[4]Tests conducted by PrimeTime's own expert showed that of fourteen homes tested in the local market, WTVD's signal exceeded 56 dBu's at nine of the homes. Thus, over sixty-four per cent of the subscribers tested in WTVD's local market were ineligible for PrimeTime's services.

II. Reporting Violations

ABC also claims that PrimeTime has failed to comply with SHVA's reporting requirements. Section 119(a)(2)(C) requires that satellite carriers provide the networks with lists of their subscribers within each network affiliate's local market. ABC states that PrimeTime twice did not provide the subscriber list in a timely manner and that PrimeTime repeatedly provides lists lacking critical address information such as the subscriber's street address and county. Section 119(a)(2)(C) requires satellite carriers to submit to the networks "a list identifying (by name and street address, including county and zip code)" all subscribers to which the satellite carrier provides network programming. 17 U.S.C. § 119(a)(2)(C). Furthermore, "on the 15th of each month, the satellite carrier shall submit to the network a list identifying (by name and street address, including county and zip code) any persons who have been added or dropped as such subscribers since the last [such] submission." Id. "The willful or repeated secondary transmission to the public by a satellite carrier of a [network station's] primary transmission . . . is actionable as an act of infringement . . . where the satellite carrier . . . has failed to make the submissions to networks required by [Section 119(a)(2)(C)]." 17 U.S.C. § 119(a)(3).

The most natural grammatical reading of this section suggests that the phrase "willful or repeated" modifies only the nearby verb "transmission." Under this construction, the phrase "willful or repeated" would not modify the failure to make the required submissions to the network. It is the failure to make the submissions, however, which transforms the otherwise legal conduct ("transmission to the public by a satellite carrier") into copyright infringement. This natural grammatical reading of the statute therefore suggests that "willful or repeated" transmissions are simply transmissions that the satellite carrier intended to make or repeatedly made and thus liability for failing to make the required submissions to the networks is strict. There is nothing in SHVA's legislative history to contradict this reading of Section 119(a)(3).

PrimeTime does not dispute that it has provided incomplete subscriber lists. Ronald Levi, PrimeTime's officer in charge of compliance with SHVA, has admitted that PrimeTime would accept a subscriber for service without knowing his county of residence. PrimeTime also does not dispute that it has occasionally failed to submit its lists in a timely manner. Rather, PrimeTime argues that it is unreasonable to expect it to produce these lists on a monthly basis and that delays in processing subscriber information were the fault of both itself and ABC. These

arguments are insufficient to defeat liability under Section 119(a)(3). As mentioned above, PrimeTime has made "willful or repeated" secondary transmissions of network programming to the public. It has also admitted its failure to supply ABC with complete and timely subscriber lists. ABC has therefore demonstrated a prima facie case of copyright infringement under Section 119(a)(3). Because the court's decision on the scope of equitable relief appropriate for PrimeTime's violation of SHVA's white area restriction may moot the relief necessary for PrimeTime's non-compliance with SHVA's reporting requirements, the court will address both issues at a subsequent hearing on ABC's remedies.

## CONCLUSION

For the foregoing reasons, the court finds that there is no genuine dispute that PrimeTime engaged in a willful or repeated pattern or practice of transmitting ABC programming to households ineligible for such service under the Satellite Home Viewer Act, and thus ABC is entitled to judgment as a matter of law on its claim of copyright infringement. The court also finds that there is no genuine dispute that PrimeTime has failed to comply with its reporting requirements under the Act.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

United States District Judge

July 16, 1998

# *Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.*

*Post Office Box 26000*
*Greensboro, North Carolina 27420*
*(336) 271-3132*
*Fax: (336) 378-1001*

FAX TRANSMISSION COVER SHEET

***Date:*** *July 16, 1998*

***To:*** *Tom Olson*

***Fax:*** *(202) 663-6363*

***Re:*** *ABC, Inc. v. PrimeTime 24 Joint Venture*

***Sender:*** *Jennifer K. Van Zant*

***Notes:***

*YOU SHOULD RECEIVE 34 PAGE(S), INCLUDING THIS COVER SHEET.*
*IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (336) 271-3132.*